ARAB MALAYSIAN FINANCE BHD.

v.

MERIDIEN INTERNATIONAL CREDIT CORPORATION LTD. LONDON

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HJ. MOHD. JEMURI BIN SERJAN CJ (BORNEO)
DATO' PEH SWEE CHIN SCJ,
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-571-1992]
27 AUGUST 1993

COMPANY LAW: Distinction between objects and powers in memorandum of association - Whether issuance of guarantee was primary object or power of the company - Whether issuance of guarantee was invalid and unenforceable - Whether issuance of guarantee was ultra vires - Consideration of ss. 2 & 4 Finance Companies Act 1969 - Companies Act 1965, ss. 18 & 19.

PRACTICE & PROCEDURE: Preliminary issues raised for the determination of the Court on points of law - Issues raised by way of application under O. 33 r. 2 Rules of the High Court 1980 - Issues involving consideration of facts - Whether application under O. 33 r.2 appropriate.

BANKING & FINANCE: Appellant company falling under the provisions of the Finance Companies Act 1969 - Directors of appellant giving guarantee in consideration of respondent continuing to provide finances to principal debtor - Principal debtor defaulting and respondent suing on the guarantee - Whether issuance of guarantee prohibited by s. 4 of the Finance Companies Act 1969 - Whether issuance of guarantee amounted to granting of unsecured advance, loan or credit facility contrary to s. 20(1) of the Finance Companies Act 1969.

EXCHANGE CONTROL: Guarantee issued to foreign company - Whether issuance of guarantee amounted to dealing in foreign exchange currency - Consideration of s. 4 Exchange Control Act 1953 and s. 6 Finance Companies Act 1969.

WORDS AND PHRASES JUDICIALLY DEFINED: "Carrying on business" - "Dealing", Exchange Control Act 1953, s. 4 - "Investment", Finance Companies Act 1969, s. 4.

The appellant was a licensed borrowing company within the meaning of the Finance Companies Act 1969 (the Act). The appellant entered into a contract of guarantee with the respondent in consideration of the respondent agreeing to continue providing finances for MAC (the principal debtor). The guarantee was duly authorised by the board of directors of the appellant.

The respondent obtained judgment against the principal debtor in respect of the balance of the amounts owing and called upon the appellant to honour the guarantee. The appellant denied liability and the following questions were raised as preliminary issues on points of law for the determination of the trial Court by way of an application under O. 33 r. 2 Rules of the High Court 1980:

(1) Whether the issuance of the guarantee by the appellant to the respondent was prohibited by the Act;
(2) Whether the issuance of the guarantee was illegal, void or unenforceable;
(3) Whether the issuance of the guarantee by the appellant was ultra vires its activities under the Act;
(4) Whether the issuance of the guarantee constituted the granting of an unsecured credit facility which is prohibited by s. 20 of the Act;
(5) If the answer to question (4) was in the positive, whether the guarantee was thereby rendered void and unenforceable;
(6) Whether the issuance of the guarantee amounted to a dealing by the appellant in foreign exchange currency which was prohibited by the Act;
(7) Whether the issuance of the guarantee was contrary to public policy;
(8) Whether there was consideration for the issuance of the guarantee; and
(9) Whether the guarantee issued by the appellant was invalid under s. 97 of the Contracts Act 1950.

The learned Judge of the High Court answered questions (1), (2), (3), (4), (5), (6), (7) and (9) in the negative and question (8) in the affirmative. The appellant, being dissatisfied with the decision of the learned Judge, appealed.

Held:

[1] As the questions raised involved a consideration of the facts, the use of O. 33 r.2 RHC 1980 was inappropriate. It was undesirable to resolve such issues on a purely hypothetical state of facts.

[2] Since the Court was dealing primarily with preliminary points of law, the Court was not

precluded from dealing with any points of law relevant and applicable to the determination of the issues. To arrive at the correct decision, consideration of any points of law which have a crucial and decisive bearing on the determination of the issues was not only fully justified but also necessary as to do otherwise would leave the questions of law fully unanswered, thereby causing more injustice.

[3] In order to determine whether the issuance of the guarantee was a business or not and whether it was carried on as such, it was incumbent to examine the memorandum of association of the appellant to ascertain what were the primary objects for which the company was incorporated.

[4] In order to determine the primary objects of the appellant only those of the objects stated in the memorandum of association which conform to the requirements and/or fall within the scope of s. 2 of the Act, which defines "borrowing business", would be regarded as the primary objects of the appellant. The other clauses in the memorandum of association, if they are relevant, must of necessity be regarded as powers of the appellant while others that are not ancillary to the primary objects and fall outside the scope of s. 2 must necessarily be ignorged and regarded as prohibited by virtue of s. 4 of the Act.

[5] Paragraphs 8 & 17 of the memorandum of association by their very nature must be regarded as powers of the company to provide guarantees to persons which have dealings with the company in carrying out its objects. That being the case, although the provision of guarantees was not the primary object of the company and by the same token not its borrowing business, the issuance of the guarantee was not caught by the prohibition in s. 4 of the Act and on the contrary was valid and enforceable against the appellant.

[6] Another approach to the determination of the appeal was to look at the meaning of the words "carrying on business" in the context of s. 4 of the Act. The issue of a guarantee on a particular or any occassion *per se* could not be regarded as a business. In the instant case it could not be concluded that providing the guarantee by the appellant constituted carrying on business as such as there was no evidence or facts to show that there was a succession of issuance of guarantees by the appellant.

[7] Under the circumstances the only conclusion possible was that the appellant did not in this instance carry on the business of providing a guarantee. Hence the guarantee at issue was not prohibited by s. 4 of the Act but was valid and enforceable.

[8] It was explicit from the definition of "borrowing business" in s. 2 of the Act that there must be "investment of the funds" and in accordance with common parlance and in the ordinary sense that businessmen understand by that term, "investment" here must be contemplated by the Legislature to mean the laying out of money in the acquisition of some species of property from which income is expected to be derived.

[9] Applying this test to s. 2 of the Act in relation to the definition of "borrowing business" it is inevitable that "investment in the funds of the company" in the definition of "borrowing company" must be construed according to its popular sense, namely, the laying out of money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield.

[10] In the present case, in the absence of evidence as to the facts, the only conclusion that could be reached was that the provision of the guarantee by the appellant could not be regarded as tantamount to an investment falling within the meaning of "borrowing business" when there was no certainty that the element of income was present.

[11] The appellant's contention that the granting of the guarantee was tantamount to the granting of a unsecured credit facility, which was prohibited by s. 20 of the Act, and that therefore it was void and unenforceable was nothing more than a futile attempt to alter the position of the guarantor to that of a creditor when in fact the guarantor's undertaking under a contract of guarantee is a collateral undertaking to answer for the debt or to fulfil the obligations of another on his default, more so in view of the fact that there was financial accomodation coming from the appellant in favour of the respondent.

[12] The primary liability lay on the principal debtor while the appellant assumed the collateral liability which would only arise on the default of the principal debtor. Section 20 of the

Act does not in any way, nor was it intended by Parliament to, alter that position to render the appellant as creditor thereby creating two creditors in respect of the same amount of money advanced to the same principal debtor.

[13] The provision of the guarantee viewed in the light of the appellant's proposition was the antithesis of giving credit, untenable and a blatant fallacy resulting in an argument *reductio ad absurdum* and the arguments advanced by the appellant on this ground must necessarily fail.

[14] The word "dealing" in s. 4 of the Exchange Control Act 1953 cannot by any reasonable process of interpretation be held to include the issuance of a guarantee in the sense that it is tantamount to either buying, borrowing, selling or lending of foreign currency. In the circumstances there was no merit in the appellant's contention that the guarantee was invalid and unenforceable on the grounds that the issuance of the guarantee amounted to dealing in foreign exchange currency which was prohibited by s. 6 of the Act.

[Appeal dismissed with costs. Deposit to respondent on account of taxed costs].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG SYARIKAT: Perbezaan diantara matlamat dan kuasa dalam memorandum persatuan - Sama ada pengeluaran jaminan merupakan matlamat utama atau kuasa syarikat - Sama ada pengeluaran jaminan adalah tidak sah dan tidak boleh dikuatkuasakan - Sama ada pengeluaran jaminan merupakan ultra vires - Pertimbangan ss. 2 & 4 Akta Syarikat Kewangan 1969 - Akta Syarikat 1965, ss. 18 & 19.

AMALAN DAN PROSEDUR: Isu-isu permulaan dibangkitkan bagi keputusan Mahkamah mengenai poin undang-undang - Isu-isu dibangkitkan melalui permohonan di bawah A. 33 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980 - Isu-isu melibatkan pertimbangan fakta-fakta - Sama ada permohonan di bawah A. 33 k. 2 sesuai.

BANK & KEWANGAN: Syarikat perayu tergolong di bawah peruntukan Akta Syarikat Kewangan 1969 - Pengarah-pengarah perayu memberikan jaminan kepada penghutang utama - Penghutang utama telah mungkir dan responden menyaman atas jaminan - Sama ada pengeluaran jaminan berjumlah kepada pemberian pendahuluan yang tidak bercagar, pinjaman atau kemudahan kredit bertentangan dengan s. 20(1) Akta Syarikat Kewangan 1969.

KAWALAN PERTUKARAN: Jaminan dikeluarkan kepada syarikat asing - Sama ada pengeluaran jaminan berjumlah kepada berurusan dalam pertukaran matawang asing - Pertimbangan s. 4 Akta Kawalan Pertukaran 1953 dan s. 6 Akta Syarikat Kewangan 1969.

PERKATAAN DAN FRASA YANG DITAKRIFKAN DARI SEGI KEHAKIMAN: "Menjalankan perniagaan" - "Berurusan", Akta Kawalan Pertukaran 1953, s. 4 "Pelaburan", Akta Syarikat Kewangan 1969, s. 4.

Perayu ialah sebuah syarikat pemberipinjam berlesen dalam lingkungan tafsiran Akta Syarikat Kewangan 1969 (Akta tersebut). Perayu telah memasuki dalam suatu kontrak jaminan dengan responden sebagai balasan kepada responden yang bersetuju untuk meneruskan pemberian pembiayaian bagi MAC (penghutang utama). Jaminan tersebut telah dibenarkan dengan sempurnanya oleh lembaga pengarah perayu.

Responden memperolehi penghakiman terhadap penghutang utama berhubung dengan baki jumlah yang terhutang dan telah menanggil perayu supaya menghormati jaminan tersebut. Perayu menafikan liabiliti dan soalan-soalan berikut telah dibangkitkan sebagai persoalan permulaan atas poin undang-undang bagi keputusan Mahkamah perbicaraan melalui suatu permohonan di bawah A. 33 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980:

(1) Sama ada pengeluaran jaminan oleh perayu kepada responden dihalang oleh Akta tersebut;
(2) Sama ada pengeluaran jaminan adalah menyalahi undang-undang, tidak sah atau tidak boleh dikuatkuasakan;
(3) Sama ada pengeluaran jaminan oleh perayu adalah *ultra-vires* aktiviti-aktivitinya di bawah Akta tersebut;
(4) Sama ada pengeluaran jaminan merupakan pemberian kemudahan kredit yang tidak bercagar yang dihalang oleh s. 20 Akta tersebut;
(5) Jika jawapan kepada soalan (4) adalah dalam bentuk positif, sama ada jaminan tersebut telah dengan itu disifatkan sebagai tidak sah dan tidak boleh dikuatkuasakan;
(6) Sama ada pengeluaran jaminan berjumlah kepada suatu urusan oleh perayu dalam pertukaran matawang asing yang dihalang oleh Akta tersebut;
(7) Sama ada pengeluaran jaminan bertentangan dengan polisi awan;

(8) Sama ada terdapat balasan bagi pengeluaran jaminan; dan
(9) Sama ada jaminan yang dikeluarkan oleh perayu adalah tidak sah di bawah s. 97 Akta Kontrak 1950.

Hakim Mahkamah Tinggi yang bijaksana tersebut telah menjawab soalan-soalan (1), (2), (3), (4), (5), (6), (7) dan (9) dalam bentuk negatif dan soalan (8) dalam bentuk positif. Perayu, yang tidak berpuashati dengan keputusan Hakim yang bijaksana tersebut, telah membuat rayuan.

Diputuskan:

[1] Memandangkan soalan-soalan yang dibangkitkan melibatkan pertimbangan fakta-fakta, penggunaan A. 33 k. 2 KMT 1980 adalah tidak sesuai. Adalah tidak diingini bagi menyelesaikan isu-isu sedemikian hanya berdasarkan kepada kaedaan fakta-fakta yang diandaikan.

[2] Memandangkan Mahkamah berurusan pada asasnya dengan poin undang-undang permulaan, Mahkamah tidak dihalang daripada berurusan dengan mana-mana poin undang-undang yang relevan dan terpakai bagi memutuskan isu-isu tersebut. Bagi mencapai keputusan yang betul, pertimbangan mana-mana poin undang-undang yang mempunyai pengaruh yang penting dan bersifat penentuan ke atas keputusan isu tersebut bukan sahaja berjustifikasi penuh tetapi juga perlu kerana jika berbuat sebaliknya, maka persoalan undang-undang tersebut akan tidak terjawab dan dengan itu menyebabkan lebih banyak ketidakadilan.

[3] Untuk memutuskan sama ada pengeluaran jaminan merupakan suatu perniagaan atau tidak dan sama ada ia dijalankan sedemikian, adalah perlu untuk memeriksa memorandum persatuan perayu bagi menentukan apakah matlamat utama bagi mana syarikat tersebut diperbadankan.

[4] Untuk memutuskan matlamat utama perayu hanya apa yang dinyatakan di dalam memorandum persatuan yang mematuhi kehendak dan/atau tergolong dalam lingkungan skop s. 2 Akta tersebut yang mentakrifkan "perniagaan peminjaman" akan disifatkan sebagai matlamat utama perayu. Fasal-fasal lain di dalam memorandum persatuan, jika adalah relevan, mestilah bagi keperluan disifatkan sebagai kuasa perayu sementara lain-lain yang tidak merupakan tambahan kepada matlamat utama dan tidak tergolong dalam skop s. 2 mestilah tidak dipedulikan dan disifatkan sebagai dihalang menurut kuasa s. 4 Akta tersebut.

[5] Perenggan-perenggan 8 & 17 memorandum persatuan atas sifat mereka mestilah disifatkan sebagai kuasa syarikat untuk memperuntukkan jaminan kepada sesiapa yang berurusan dengan syarikat dalam menjalankan matlamatnya. Oleh itu, walaupun peruntukan jaminan bukanlah matlamat utama syarikat dan begitu juga dengan perniagaan peminjamannya, pengeluaran jaminan tidaklah terlibat dalam halangan s. 4 Akta tersebut dan sebaliknya adalah sah dan boleh dikuatkuasakan terhadap perayu.

[6] Satu lagi pendekatan kepada pemutusan rayuan ialah dengan melihat kepada maksud perkataan "menjalankan perniagaan" dalam konteks s. 4 Akta tersebut. Isu jaminan atas sesuatu atau mana-mana ketika *per se* tidak boleh disifatkan sebagai suatu perniagaan. Dalam kes kita ini tidak boleh disimpulkan bahawa memperuntukkan jaminan oleh perayu menjadikannya sebagai menjalankan perniagaan sebagaimana yang sedemikian kerana tiada keterangan atau fakta-fakta untuk menunjukkan bahawa terdapat penerusan pengeluaran jaminan oleh perayu.

[7] Dalam keadaan ini, satu-satunya kesimpulan yang mungkin adalah bahawa perayu tidak dalam ketika ini menjalankan perniagaan memperuntukkan jaminan. Maka jaminan yang dipersoalkan di sini tidak dihalang oleh s. 4 Akta tersebut tetapi adalah sah dan boleh dikuatkuasakan.

[8] Daripada takrifan "perniagaan peminjaman" dalam s. 2 Akta tersebut adalah jelas bahawa mestilah terdapat "pelaburan dana" dan mengikut bahasa umum dan dari segi pemahaman biasa yang ahli perniagaan fahami dari terma tersebut, "pelaburan" mestilah digambarkan oleh Perundangan untuk bermakna memberi wang dalam mendapatkan beberapa contoh harga daripada mana pendapatan dijangkakan akan diperolehi.

[9] Menggunakan ujian ini kepada s. 2 Akta tersebut berhubung dengan takrifan "perniagaan peminjaman" tidak dapat dielakkan bahawa "pelaburan dalam dana syarikat" dalam takrifan "syarikat peminjaman" mestilah ditakrifkan mengikut pemahaman

yang popular iaitu, memberikan wang dalam pembelian beberapa harta daripada mana kepentingan atau keuntungan dijangkakan dan harta yang mana dibeli untuk dipegang bagi mendapatkan pendapatan yang akan dihasilkan olehnya.

[10] Dalam kes semasa ini, dalam ketiadaan keterangan mengenai fakta, satu-satunya kesimpulan yang dapat dicapai ialah peruntukan jaminan oleh perayu tidak boleh disifatkan sebagai bersamaan dengan suatu pelaburan yang tergolong dalam lingkungan "perniagaan peminjaman" apabila tiada kepastian bahawa unsur pendapatan wujud.

[11] Penghujahan perayu ialah bahawa memberikan jaminan adalah bersamaan kepada memberikan kemudahan kredit tidak bercagar, yang mana dihalang oleh s. 20 Akta tersebut, dan bahawa ia adalah tidak sah dan tidak boleh dikuatkuasakan merupakan satu usaha yang sia-sia sahaja untuk mengubah kedudukan penjamin kepada pemiutang apabila sebenarnya akujanji penjamin di bawah kontrak jaminan ialah suatu akujanji kolateral untuk menjawab hutang tersebut atau memenuhi obligasi orang lain atas kemungkirannya, lebih-lebih lagi memandangkan kepada fakta bahawa terdapat bantuan kewangan daripada perayu bagi manfaat responden.

[12] Liabiliti utama terletak ke atas Penghutang Utama sementara perayu mengambil liabiliti kolateral yang hanya akan timbul atas kemungkiran Penghutang Utama. Seksyen 20 Akta tersebut tidak dalam apa cara jua, ataupun diniatkan oleh Parlimen untuk mengubah kedudukan tersebut bagi menyifatkan perayu sebagai Pemiutang dan dengan itu mewujudkan dua pemiutang berhubung dengan jumlah wang yang sama yang didahulukan kepada Penghutang Utama yang sama.

[13] Peruntukan jaminan tersebut yang dilihat dari segi cadangan perayu adalah bertentangan kepada pemberian kredit, tidak boleh dipertahankan dan merupakan salah anggapan yang terang-terang membawa kepada penghujahan *reductio ad absurdum* dan penghujahan yang dikemukakan oleh perayu atas alasan ini haruslah gagal.

[14] Perkataan "berurusan" dalam s. 4 Akta Kawalan Pertukaran tidak boleh dari segi mana-mana proses pentafsiran yang munasabah diputuskan untuk memasukkan pemberian jaminan dalam ertikata bahawa ia adalah bersamaan kepada sama ada membeli, meminjam, menjual atau memberipinjam matawang asing. Dalam hal ini tiada sebarang merit dalam penghujahan perayu bahawa jaminan tersebut adalah tidak sah dan tidak boleh dikuatkuasakan atas alasan bahawa pemberian jaminan adalah bersamaan kepada berurusan dalam matawang pertukaran asing yang mana dilarang oleh s. 6 Akta tersebut.

[Rayuan ditolak dengan kos. Deposit kepada responden atas akaun kos yang ditetapkan].

Cases referred to:

Wragg, In re Wragg v. Palmer [1919] 2 Ch. 58 ***(foll)***
IRC v. Rolls-Royce Ltd. [1944] 2 AER 340 ***(foll)***
IRC v. Desoutter Bros. Ltd. [1946] 1 AER 58 ***(refd)***
Sander v. Kentish & Hawksley 8 TR 162 (Volume C1 ER 8 KBD 1323) ***(refd)***
Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd. [1978] 139 CLR 410 ***(refd)***
Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. [1990] 1 CLJ 675 / [1990] 1 MLJ 356 ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors. [1981] 1 MLJ 14 ***(refd)***
Newcres Sdn. Bhd. v. Sri Alam Sdn. Bhd.[1991] 3 CLJ 2781 / [1991] 3 MLJ 474 ***(refd)***
Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock Urban District Council [1968] Ch. 605 ***(refd)***
Cotman v. Brougham [1918] AC 514 ***(refd)***
In re German Date Coffe Company [1981-82] Ch. D. 169 ***(refd)***
Stphens v. Mysore Reefs (Kangundy) Mining Company Limited [1902] 1 Ch. 745 ***(refd)***
Re Geigy (Canada) Ltd. [1969] 66 WWR 689 ***(cit)***
Nash v. Layton [1911] 2 Ch. 71 ***(refd)***
Smith v. Anderson [1880] 15 Ch. D. 247 ***(refd)***
Baju Ria v. Liau Kim Lian [1965] 31 MLJ 128 ***(refd)***
Hare v. Schurek, The Times Law Report, 28 May 1993 ***(refd)***
City Index Ltd. v. Leslie [1991] 3 WLR (CA) 207 ***(refd)***
IRC v. Broadway Car Co. (Wimbledon) Ltd. [1946] 2 AER 609 ***(refd)***
Sevenoaks Urban District Council v. Twynam [1929] 2 KB 440 ***(refd)***
Gas Lighting Improvement Company, Limited v. Commissioners of Inland Revenue [1923] AC 723 ***(refd)***
R v. Miller [1977] 3 AER 986 ***(cit)***
The Queen v. Peters [1885-86] 16 QBD 636 ***(refd)***
Herbert v. The King [1941] CLR Vol. 64, 461 ***(refd)***
Malaysia Shipyard and Engineering Sdn. Bhd. v. Bank Kerjasama Rakyat Malaysia Bhd. [1985] 2 CLJ 427 / [1985] 2 MLJ 359 ***(cit)***

Legislation referred to:
Borrowing Companies Act 1969, s. 20
Companies Act 1965, ss. 18, 19
Contracts Act 1950, ss. 24 & 97
Exchange Control Act 1953, s. 4(1)
Finance Companies Act 1969, ss. 2, 4, 6, 20(1), 47(2) & 49
Rules of the High Court 1980, O. 33 r. 2
Consumer Credit Act 1974, s. 40 (UK)
Financial Services Act 1986 (UK)
Finance (No. 2) Act 1913 (UK)
Finance (No. 2) Act 1939 (UK)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 22, Paragraphs 26-27

For the appellant - Cecil Abraham (Teo Cheng Wee with him); M/s. Khaw & Hussein
For the respondent - Sri Ram (Philip Choong with him); M/s. Philip Choong & Co.

JUDGMENT

Amar Hj. Mohd. Jemuri Serjan CJ (Borneo): This appeal arose out of the decision of the High Court at Kuala Lumpur on certain preliminary issues on points of law raised by the respondent by way of an application under O. 33 r. 2 of the Rules of the High Court 1980. The issues involve the interpretation of certain provisions of the Borrowing Companies Act 1969 (Act No. 6) which later on, by amendment, was known as the Finance Companies Act 1969, (the Act) and referred to as such throughout our judgment.

The first defendant was at all relevant times a licensed borrowing company within the terms of the Finance Companies Act 1969. By a Letter of Guarantee dated the 25 August 1980, the first defendant, in consideration of the plaintiff's agreeing at the 1st defendant's request to enter into or continue with shipping and/or commercial and/or financial transactions with Malaysia Air Charter Co. Sdn. Bhd. (the Principal Debtor) relating to the purchase of aircraft and spares by the said Debtor, agreed to guarantee the repayment to the plaintiff on demand of all sums of money due and owing to the plaintiff by the said Principal Debtor arising out of any transactions aforesaid or otherwise, together with all costs, commissions, interests, charges and expenses of whatsoever nature provided that the total amount recoverable from the first defendant shall not exceed RM2,340,000, exclusive of such costs, commissions, interests, charges and expenses. The issue of the Letter of Guarantee was duly authorised by the Board of the first defendant. Subsequent to the issue of the Letter of Guarantee, the plaintiff entered into financial transactions covered by the guarantee with the Principal Debtor and in respect of the balance of the amounts owing by the Principal Debtor the plaintiff obtained judgment against it in Kuala Lumpur High Court Civil Suit No. C1255 of 1984. The first defendant denied liability under the guarantee on several grounds.

The 2nd, 3rd, 4th and 5th defendants apparently were at all relevant times Directors of the first defendant. By consent of the parties, the following issues were raised for the determination of the High Court as issues on points of law:

(1) Whether the issuance of the Guarantee dated 25 August 1980 by the first defendant to the plaintiff to secure the repayment by Malaysia Air Charter Co. Sdn. (hereinafter called "the Principal Debtor") of money due and owing by the Principal Debtor to the plaintiff is prohibited by the Finance Companies Act 1969;
(2) Whether the issuance of such Guarantee is illegal, void or unenforceable;
(3) Whether the issuance of such Guarantee by the first defendant is *ultra vires* its activities under the Finance Companies Act 1969;
(4) Whether the issuance by the first defendant to the plaintiff of the Guarantee constituted the granting of an unsecured credit facility which is prohibited by s. 20 of the Finance Companies Act 1969;
(5) If the answer to issue (4) is in the positive, whether the guarantee was thereby rendered void and unenforceable;
(6) Whether the issuance of the Guarantee amounted to a dealing by the first defendant to the plaintiff in foreign exchange currency and therefore prohibited by the Finance Companies Act 1969;
(7) Whether the issuance of the Guarantee by the 1st defendant to the plaintiff is contrary to public policy;
(8) Whether there is consideration for the Guarantee; and
(9) Whether the Guarantee issued by the second defendant is invalid under s. 97 of the Contracts Act 1950.

His Lordship in the High Court answered Questions Nos. (1), (2), (3), (4) and (5) in the negative. Questions Nos. (6), (7), (8) and (9) were not pursued seriously. Questions Nos. (6), (7) and (9) were also answered in the negative but Question No. (8) in the affirmative.

It would appear that the decision of his Lordship was primarily based upon two main reasons. After discussing various authorities cited before him, particularly *Wragg*, In *re Wragg v. Palmer* [1919] 2 Ch. 58; *IRC v. Rolls-Royce Ltd.* [1944] 2 AER 340 and *IRC v. Desoutter Bros. Ltd.* [1946] 1 AER 58 his Lordship was inspired to come to the conclusion that the definition of the term "investment" set out by Macnaghten J. in *Rolls-Royce*' case *(supra)* and Lord Greene MR in *Desoutter's* case *(supra)* was not exhaustive and that the giving of guarantees as a business was in fact an investment within the definition of borrowing business in s. 2 of the Finance Companies Act. Secondly, on the authorities of *Sander v. Kentish & Hawksley* 8 TR 162 (Vol. C1 ER 8 KBD 1323) and *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410, his Lordship construed the provisions of the Finance Companies Act as a piece of legislation for the protection of the public and the avoidance of the guarantee of the first defendant as being void and unenforceable being in contravention of s. 4 of the Act, and by the operation of s. 24 of the Contracts Act would cause grave inconvenience and injury to an innocent member of the public without furthering the object of the Finance Companies Act. In his view, the respondent was an innocent member of the public providing loans to Malaysia Air Charter at the request of the appellant and on the strength of the guarantee provided by the appellant which itself was later impugned as void and unenforceable to avoid its liability under the guarantee would be a victim if the guarantee was held to be void and unenforceable.

While we agree with the decision of his Lordship on the issues for his determination, with respect, we do not agree with his reasons therefor and do not share his views particularly on the interpretation he placed upon the word "investment" in s. 2 of the Act.

Before us the appellant contended that the guarantee was not an investment as there was no application of money in the purchase of some property from which interest or profit was expected and which property was purchased in order to be held for the sake of income which it would yield relying principally on *Wragg v. Palmer* and *IRC v. Rolls-Royce Ltd.*, and the provision of the guarantee by the first defendant was *ultra vires* the Finance Companies Act. Further, the issuance of the guarantee, not being a borrowing business, was prohibited by s. 4 of the Act and not being an investment was therefore void and unenforceable by the operation of s. 24 of the Contracts Act. Reliance was placed heavily on the case of *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd.* [1990] 1 MLJ 356; *Yeep Mooi v. Chu Chin Chua & Ors.* [1981] 1 MLJ 14, amongst others. Similarly, it was also contended by the appellant that the guarantee was tantamount to granting to the principal debtor unsecured credit facilities, thereby enabling the Debtor to receive cash, goods and/or services from the creditor or a third person and contravening the provisions of s. 20(1) of the Act which prohibited such transaction as a business. Additionally, it was also argued by the appellant that the issuance of the guarantee amounted to dealing by the appellant in foreign exchange currency which was prohibited by s. 6. In view of the prohibition of these transactions under s. 20(1) and s. 6 of the Act the guarantee, therefore, on these grounds was also void and unenforceable.

It seems obvious to us that since Question No. (1) involves consideration of both mixed questions of facts and law, to arrive at the correct determination of the issue the facts must first be ascertained and established from which the question of law may be determined. Where the issues on point of law to be decided under O. 33 r. 2 involve the consideration of facts, resort to O. 33 r. 2 is inappropriate. We have occasion to address ourselves on the propriety or otherwise of resorting to O. 33 r. 2 in our decision in the case of *Newacres Sdn. Bhd.v. Sri Alam Sdn. Bhd.* [1991] 3 MLJ 474. It is undesirable to resolve such issues on a purely hypothetical state of facts. We would echo the words of Sachs LJ in the case of *Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock Urban District Council* [1968] Ch. 605 at page 632 thus:

> In the category of cases which come before the courts in an unsatisfactory form, the one now under consideration ranks high. Any preliminary issue which falls to be tried in the

course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable ...

Here, in the instant case, we were confronted with two problems whose solutions depend entirely on facts to be established. Firstly, was the provision of guarantee necessarily a business in the context of the present case, and, if it was, was it carried on as the business of the appellant company? The first issue is purely a question of law and the second a mixed question of facts and law. Since we are at this stage dealing primarily with preliminary points of law we are not precluded from dealing with any points of law relevant and applicable to the determination of the issues even if they were never adverted to and canvassed by both Counsel, inadvertently or otherwise, or because it never occurred to them that these points of law were relevant to the proper determination of the issues on account of wrong perception of the crux of those issues. To arrive at the correct decision, consideration of any points of law which have a crucial and decisive bearing on the determination of the issues before us is not only fully justified but also necessary as to do otherwise would leave the questions of law fully unanswered, thereby causing more injustice. What we had here was only the fact that on 25 August 1980 the appellant company entered into a contract of guarantee with the respondent in the sum of RM2,340,000 for the repayment of all sums of money which was still owing by the principal debtor to the respondent in consideration of the respondent agreeing at the request of the appellant company to continue providing finances to Malaysia Air Charter Co. Sdn. Bhd. In view of the welter of authorities on what constitutes business and what is the correct interpretation of the expression "carrying on business" it would be necessary to consider the objects for which the appellant company was incorporated. In order to determine whether the issuance of its guarantee was a business or not and was carried on as such it is incumbent upon us to examine the Memorandum of Association of the appellant company to ascertain what were its primary objects for which the company was incorporated. For this purpose we had to go back awhile to look at the history of the appellant company, the date of its incorporation and subsequent development affecting it.

The appellant company was incorporated under the provisions of the Companies Act 1965 on 6 November 1968 as a private company limited by shares. By a resolution dated 12 December 1968 it was resolved that the appellant company be converted into a public company and was so converted on 14 December 1968. On the other hand, the Finance Companies Act 1969 came into force on 1 June 1969 by virtue of [P.U.(B) 128/69] which was after the incorporation of the appellant company. Therefore, at the time when the appellant company was incorporated and converted as a public company the Memorandum of Association of the company was prepared and designed in such a way as to enable it to be engaged in the business of not only a strictly finance company, but also a company which was involved in a host of other business activities, not merely related to the business of a finance company. The Memorandum of Association clearly testifies to these activities and thus contained a profusion of every conceivable form of activities such as investment in immovable and movable properties, development and sale of land so developed; business as capitalist, financiers, concessionaires and merchants for promotion of sale for cash or credit, hire-purchase of aircraft, vehicles, goods, machinery wares and merchandise of every description, as importers and exporters, miners, smelters, coal and iron masters, quarry owners and brick-makers, timber merchants and rubber dealers; builders, shipowners and wharfingers, invest and deal in stocks, shares, bonds, debentures and securities to name a few. Its objects also extended to carrying on the business of planters, timber merchants, sawmill, colliery, quarry proprietors, farmers, graziers, cattle ranches, sheep farmers and growers of all produce and to deal in produce of all kinds.

However, on the coming into force of the Finance Companies Act 1969 the appellant company, by virtue of s. 47(2) of the Act, was required to apply for a licence if it wished to continue to carry on borrowing business which in fact it did. Thus, the appellant company became a licenced borrowing company. Under s. 49 of the Finance Companies Act it is provided that the Finance Companies Act shall be without prejudice to the provisions of the Companies Act 1965 and that where there is a conflict between the Act and the Finance

Companies Act the provisions of the latter Act shall prevail. In view of the provisions of this section of the Act the object Clause in the Memorandum of Association of the appellant company must be examined in the light of the provisions of s. 2 which defines "borrowing business" and s. 4 of the Act which prohibits the appellant company from carrying on business other than borrowing business. It means that in order to determine the primary objects of the appellant company after the coming into force of the Act only those of the objects stated in the Memorandum of Association which conform to the requirements and/or fall within the scope of s. 2 would be regarded as the primary objects of the appellant company. The other clauses in the Memorandum of Association which do not conform and/or fall outside the scope of s. 2 must, of necessity, if they are relevant, be regarded as powers of the Appellant company while others that are not ancillary to the primary objects and fall outside the scope of s. 2 must necessarily be ignored and regarded as prohibited by virtue of s. 4.

The distinction, in our view, between the primary objects and the powers of a company is of importance here as it has a decisive bearing on the determination of this appeal. The Memorandum of Association should set out the purpose the company is formed to achieve the kind of activities or business which it is to carry on and it is in the object Clause of the Memorandum of Association that the perimeter of permissible activities of the company is set out so that if it attempts to do anything beyond that perimeter it is exceeding its objects and thereby acting *ultra vires*. On the other hand, the powers of the company are ancillary to the main objects and are given to the company to enable it to carry on its primary objects or businesses. Lord Wrenbury in the case of *Cotman v. Brougham* [1918] AC 514 at page 522 on this point remarked:

> My Lords, I cannot doubt that when the Act says that the memorandum must 'state the objects' the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined.
>
> The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects.
>
> The objects of the company and the powers of the company to be exercised in effecting the objects are different things. Powers are not required to be, and ought not to be, specified in the memorandum. The Act intended that the company, if it be a trading company, should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade ...

To illustrate further the difference between the object and the power of a company it would be relevant also to consider the case of *In re German Date Coffee Company* [1981-82] 20 Ch. D. 169. In that case the company was registered for several objects, the first object being to acquire a German patent granted to one Henley for manufacturing from dates a substitute for coffee. The second was to make and use the same invention or any improvement of it. The third object was to adopt and carry out an agreement dated 16 February 1881 which was an agreement for the sale of the German patent. Article 5 was to grant licences. Article 6 was to apply for and obtain patents for improvements or extensions of the said invention. Article 7 was to acquire and purchase, or otherwise to use, exercise, and vend, any other inventions for the above mentioned or cognate subject. All those provisions were merely ancillary provisions. Then there was Article 8 which authorized the company to import all descriptions of produce, in connection with the above mentioned purpose, or otherwise for the purposes of the company. It turned out that the German Empire would not grant the patent. It was held in that case that the real contemplated object of the company at the time when it was formed was to carry out the manufacture of German Date Coffee, to be manufactured from dates, to be manufactured in Germany under a patent that was actually granted or about to be granted, and that in the contemplation of all parties the granting of the latest patent in Germany for the working of this invention was the basis of the company. It was said that it was not a general partnership to make a substitute for coffee from dates, but to work a particular patent, and as that particular patent did not exist, and could not exist,

the shareholders were entitled to say that the company ought to be wound up. Since the patent was never granted, the whole substratum of the company was gone and therefore the Court allowed the application to wind up the company on that ground.

Lindley LJ, in agreeing with the judgment of the other members of the Court of Appeal, at page 188 made the following observations:

> ... The first question we have to consider is, What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words, so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this company, which, by the by is called the *German Date Coffee Company, Limited* was to manufacture a substitute for coffee in Germany under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money.

Swinfen Eady J. in the case of *Stephens v. Mysore Reefs (Kangundy) Mining Company Limited* [1902] 1 Ch. 745 applied the judgment of Lindley LJ in the *German Date Coffee* case. In that case the company was incorporated as a reconstruction of a former company which had been registered earlier under the name of the *Mysore Reefs (Kangundy), Limited*. The memorandum of association of the company defined the objects for which the company was established by twenty-five paragraphs. The first paragraph stated that the company was to acquire and take over as a going concern the undertaking of the *Mysore Reefs (Kangundy), Limited* and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect with or without modification the agreement referred to in clause 3 of the articles of association of the company which was an agreement for the purchase of the business and assets of the old company from its liquidator. Paragraph 2 contained the power to acquire gold mines, mining and other rights, land, auriferous, metalliferous, or otherwise, or any interests in the same respectively in Mysore and elsewhere, and to work, exercise, develop and turn to account the same mines, rights and land or interests therein respectively. The company soon after its incorporation sent out mining experts to India to report upon the mining property which they had taken over from the old company. They reported that it was undesirable to spend more money upon the property, and mining operations were then wholly abandoned. The directors then tried to find and acquire a new property and sent out a circular to the shareholders, announcing that the directors had before them several offers of mining properties, and had entered into negotiations with a view to acquiring a property in the British Gold Coast, West Africa. All the shareholders in the company applied for a declaration that a scheme for acquiring by means of a subsidiary company and interest in gold mining property in West Africa, proposed by the directors in the circular was *ultra vires* and for an injunction restraining the company from carrying out the scheme. Swinfen Eady J. took the first paragraph as stating the principal or primary object for which the company was formed while the remaining paragraphs to be read as conferring on the company full and ample powers for carrying out that main object. He came to the conclusion that the proposed scheme was not authorized by the memorandum, and therefore allowed the application. The passage of his judgment at page 749 indicated clearly his line of reasoning:

> In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3, as stating the principal or primary object for which the company is formed, i.e. 'to acquire and take over as a going concern the undertaking of the *Mysore Reefs (Kangundy)*, Limited'. Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out the main object. It is right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But it is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am

> precluded from wide a construction, not only by the general principles of construction, but by the several authorities cited by Counsel for the plaintiff, and particularly by Lindley LJ's judgment in the case of *In re German Date Coffee Co* ...

In that case we observe that reliance on the ancillary powers of the company, particularly paragraph 25, did not rescue the company from being wound up because of the collapse of the main objects. Paragraph 25 reads:

> 25. To do all such things as are incidental or conducive to the attainment of the above objects, and so that the word 'company' in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere, and so that the objects specified in each paragraph of this clause shall, except when otherwise expressed in such paragraph, be in no wise limited or restricted by reference to or inference from the terms of any other paragraph or the name of the company.

At page 523 of *Cotman's case*, Lord Wrenbury criticised strongly the practice of burying beneath a mass of words the real object of the company in the following words:

> ... There has grown up a pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose, but confusing power with purpose and indicating every class of act which the corporation is to have power to do ...

This is precisely what happened in the Memorandum of Association of the appellant company which contained 33 paragraphs. In s. 18, Part III, Division 1 of our Companies Act 1965 (Act 125) the memorandum of association of the company is required to show the name of the company and its objects whereas the powers of the company are covered by s. 19 in Division 2 of the Act thereby showing the distinction between the objects and the powers of the company but it seems the practice of registering the memorandum of association which includes both objects and powers together continues to this day inspite of the strong protest by Lord Wrenbury against such practice.

Looking at the Memorandum of Association of the appellant company, we find that not all the paragraphs set out the primary objects or business of the appellant company so as to come within the scope of s. 2 of the Finance Companies Act. Those objects which squarely fall within the definition of borrowing business can easily be identified as paragraphs (1), (4), (5) and (9) and possibly (13). Paragraph (1) deals with receipt of deposits and advancements of deposits or lending money securities and properties; paragraph (4) deals with purchase or acquisition for investment or resale in lands, houses, buildings, plantations and immovable property of any tenure or any interest as well as movable property of any description. Paragraph (5) deals with development of land acquired by or in which the company is interested, and in particular by laying out and preparing the same for building purposes, constructing... Paragraph (9) deals with investment or dealing in the sale and purchase of any stocks, shares, bonds, debentures, debenture stock and securities of any government ... and paragraph (13) deals with the carrying on the business of planters, timber merchants, lumber merchants, sawmill, colliery and quarry proprietors,... It seems clear to us that all these objects come within the definition of "borrowing business", i.e. under s. 2(a) the acceptance of any money on deposit or loan, s. 2(b)(i) the lending, and (ii) the investment of the appellant's funds. The rest of the paragraphs which did not come within the definition of "borrowing business" must be regarded as the powers of the company in so far as they are ancillary to the carrying on of the primary objects of the appellant company. Paragraph 6, for example, which deals with management of land, buildings and other property that is to be developed by the company under the investment paragraph is clearly the power given to the company to carry out the investment. Similarly, paragraph 8 and paragraph 17 of the Memorandum of Association by their very nature must be regarded as powers of the company to provide guarantee to persons which have dealings with the appellant company in carrying out its objects.

That being the case, therefore, it is our considered view that the provision of guarantee by the appellant company is not the primary object of the company, and by the same token not its borrowing business. It follows that the issuance of the guarantee was not caught by the prohibition in s. 4 of the Act and on the contrary valid and enforceable against the appellant.

Another approach to the determination of this appeal is to look at the meaning of the words "carrying on business" in the context of s. 4 of the Act. What do the words "carrying on business" connote? It was contended by Encik Sri Ram for the respondent company that a finding that a person was "carrying on business" in a certain area was a finding of fact, citing the case of *Re Geigy (Canada) Ltd*. [1969] 66 WWR 689 with which contention we agree but we hasten to add that whether the business that was carried on was within the ambit of a statutory provision is a question of law. How could it be decided, whether the appellant company was carrying on the business of providing the guarantee and that it was not an occasional one or one-off transaction unless the facts are sufficiently established before us to show there was that carrying on of that business? This is not purely a question of law but a question of mixed law and fact. The facts have to be ascertained first before we can decide the question of law arising from those facts whether the respondent was or was not carrying on the business of providing guarantee when it did so in this case.

Thus, in the case of *Nash v. Layton* [1911] 2 Ch. 71 which was a money-lending case at page 82 Buckley LJ said:

> ...Whether a man is a money-lender or not is an investigation whether he has done such a succession of acts as that upon the facts proved by establishing that those acts were done the Court arrives at the conclusion as matter of law that he falls within the definition of a money-lender in the Act of Parliament...

At page 83 he continued:

> ... I apprehend that to establish that a man is a money-lender the relevant evidence is evidence to prove that he has done such a succession of acts of such a character as that the Judge ultimately says, Having ascertained all those facts as to the acts which he did, the times and dates when he did them, the terms which he imposed and so on, the result is that, looking at this Act of Parliament which defines what a money-lender is, I as matter of law hold him to be a money-lender.

This case clearly illustrates that before one can decide whether a person carries on a particular business there must be evidence to prove the carrying on of that business and that the words "carrying on" as has been frequently judicially interpreted, connotes a succession of acts.

Perhaps, at this juncture we should interpolate to say something about what is "a business" and we can do no better than to quote Jessel MR in the case of *Smith v. Anderson* [1880] 15 Ch.D. 247. At page 258 the Master of the Rolls observed:

> ... First, what is the meaning of 'any other business'? Now 'business' itself is a word of large and indefinite import. I have before me the last edition of **Johnson's Dictionary**, edited by Dr. Latham, and there the first meaning given of it is, 'Employment, transaction of affairs', the second, 'an affair'; the third, 'subject of business, affair, or object which engages the care.' Then there are some other meanings and the sixth is, 'something to be transacted.' The seventh is, 'something required to be done.' Then taking the last edition of the **Imperial Dictionary,** which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: 'Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement.' That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of excessive use and indefinite signification. Then, 'Business is a particular occupation, as agriculture, trade, mechanics, art, or profession, and when used in connection with particular employments it admits of the plural that is, businesses.' Therefore the Legislature could not well have used a larger word.
>
> In addition to the two dictionaries I have also looked at the case of *Harris v. Amery* Law Rep. 1 C.P. 148. in which forty-six people hired some land to carry on a farm, that is, they carried on the farm between them. A single man carrying on a farm may farm his own land, but he is carrying on a business. Sometimes he is called a gentleman farmer, but he is still carrying on a business, and, of course, these forty-six persons were carrying on a business, and it was held that it was an illegal association under this very Act of Parliament. because there were more than twenty of them ...

Applying the meaning of business to the instant case and based on whatever facts available before us, we come to the only conclusion anyone could come to under the circumstances that it is beyond argument the issuance of a guarantee on a particular or any occasion *per se* could not be regarded as a business. Besides,

we were not informed of the circumstances under which the said guarantee was granted by the appellant company in view of the procedure taken by the parties to these proceedings and neither was it divulged in the High Court, judging from the remarks of the learned Judge in his judgment at page 29 of the Record of Appeal. Therefore, there was no disclosure in what manner, if the issuance of a guarantee was regarded as a business, a profit would be derived therefrom as no businessman in his right sense would embark on a business, knowing that it would not be profitable to do so, profit being the ultimate objective of all businessmen. Indeed, the Counsel for the appellant company himself conceded that the appellant company received neither benefit nor income from the issuance of the guarantee.

Coming back to the question of the meaning of "carrying on business", we have also considered the judgment of Brett LJ in *Smith v. Anderson (supra)* where the meaning of this expression was dealt with at page 277, thus:

> ...The expression 'carrying on' implies a **repetition of acts**, and excludes the case of an association formed for doing one particular act which is never to be repeated. **That series of acts is to be a series of acts which constitute a business**. Now, the word 'business' might in a grammatical sense include things which no ordinary person would call a business, and inasmuch as the Legislature could not particularize every kind of business which they intended to include, they have, in order to confine the meaning of that large word 'business' stated that it is to be a business 'that has for its object the acquisition of gain. The association, then, must be formed in order to carry on **a series of acts** having the acquisition of gain for their object.
> (Emphasis added)

Nearer home there is the case of *Baju Ria v. Liau Kim Lian* [1965] 31 MLJ 128; again a case involving the meaning of "carrying on business of moneylending". Thompson CJ (as he then was) also was of the view that:

> ... A moneylender is not a person who lends money, he is a person who carries on the business of moneylending and 'carrying on' involves some sort of course of continuing conduct ...

In the recent case of *Hare v. Schurek* reported in The Times Law Report of 28 May 1993, the Court consisted of Lord Justice Dillon, Lord Justice Mann and Lord Justice Steyn decided a private or one-off offer of a loan made by a person in business did not amount to a business activity, within the meaning of the Consumer Credit Act 1974, and accordingly no licence under s. 40 was required, and since there were no findings of fact in the judge's judgment as to whether the agreement was private or a one-off transaction, the appeal would be allowed and the case remitted for a re-hearing. In the instant case we do not have the benefit of the evidence or facts to show that there was a succession of issuance of guarantees by the appellant company so as to assist us to come to the conclusion that providing the guarantee to the appellant company constituted carrying on business of such. Under the circumstances, we are compelled to arrive at the only conclusion possible and that is that the appellant did not in this instance carry on the business of providing a guarantee. Hence, the guarantee at issue was not prohibited by s. 4, but is valid and enforceable.

As we had indicated earlier on that we do not agree with his Lordship's interpretation of the expression "investment" as defined in s. 2 of the Act, we should give our reasons for our dissension. We are satisfied that the learned Judge's proposition was unfounded and that it was his Lordship's own view that the definition of "investment" as given by Macnaghten J. in *IRC v. Rolls-Royce Ltd.* (supra) and extended by Lord Greene MR in *IRC v. Desoutter Bros. (supra)* should be further extended by adding to the list issuance of guarantee as an investment. In the first place, to equate a guarantee with investment, in our view, is a misuse of the language insofar as it was used with reference to the Finance Companies Act. It may very well be that the expression "investment" has been given other definitions in other legislations. For instance, the case of *City Index Ltd. v. Leslie* [1991] 3 WLR (CA) 207 where it is given a special definition in the English Financial Services Act, 1986. In some of the authorities which we would advert to later "investment" was given a special meaning under the English Finance (No. 2) Act, 1913 and Finance (No. 2) Act 1939. To adopt such definition or the reasoning of the cases under those Acts for the purpose of construing "investment" as used in the Finance Companies Act would not be justified.

It cannot be overemphasised that here we are dealing with the definition of "borrowing

business" as defined in s. 2 of the Act. For the purpose of convenience, we would reproduce the definition of "borrowing business" insofar as it relates to investment.

> ... 'Borrowing business' means:
>
> (a) .....
> (b) (i) .....
> (ii) **the investment**, or
> (iii) .....
> **by the borrower**, his agents or his servants (and if the borrower is a company, including its wholly-owned subsidiaries) **of the borrower's funds**.

The key words are "the investment by the borrower of the borrower's funds." It is explicit from this definition that there must be "investment of the funds" and in accordance with common parlance and in the ordinary sense that businessmen understand by that term, "investment" here must be contemplated by the Legislature to mean "the laying out of money in the acquisition of some species of property from which income is expected to be derived." The definition in s. 2 of the Act employs plain words which do not admit of any doubt or ambiguity, and we therefore would interpret the word "investment" as expounded in the case of *Wragg In re Wragg v. Palmer (supra)* and *IRC v. Rolls-Royce Ltd. (supra)* as the correct interpretation for the purpose of this appeal. The relevant passages of the judgment of P.O. Lawrence J. in *Wragg's case* appears at pages 64 and 65 and read as follows:

> ...Without attempting to give an exhaustive definition of the words 'invest' and 'investment' I think that the verb 'to invest' when used in an investment clause may safely be said to include as one of its meanings 'to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield'; whilst the noun 'investment' when used in such a clause may safely be said to include as one of its meanings 'the property in the purchase of which the money has been so applied.' No doubt in many cases the context in which the word 'investments' occurs requires that this word should be confined to investments consisting of stocks shares and securities, but where the word 'investments' is used without any such context, or where, as in this case, the instrument in which it occurs expressly provides that the word is not to have any such restricted meaning, I think that it includes real estate purchased as an investment ...

The relevant judgment of Macnaghten J. in the *Rolls-Royce* case appears at pages 341 to 342 in the following words:

> Some light on the true interpretation of the word 'investment' in the Finance (No. 2) Act 1939, Sched. VII, para. 6(1), may, I think, be obtained from consideration of the provisions of subpara (2). The income which is to be included in the profits under subpara. (1) is, it will be observed, income received from investments in the case of a building society, of a banking business, assurance business, and a business concerned, wholly or mainly, in dealing in or holding of investments. In all those cases the investments would be investments acquired by the laying out of money. A banking business has nothing but money for investment; so, too, in the case of a building society which receives money from its shareholders and depositors: and an assurance business which receives premiums on the policies of insurance which it issues and has to create a fund for the purpose of meeting its obligations under the policies. It is the money which such businesses receive that is laid out in the purchase of investments. Businesses consisting wholly or mainly in dealing in or holding investments would, as a general rule, be businesses where money, and nothing but money, is laid out in acquiring the investments.
>
> The conclusion at which I arrive, not without some doubt, is that the word 'investments' in para. 6(1), ought to be construed as investments acquired by the laying out of money.

Quite contrary to Encik Sri Ram's contention, the *Rolls-Royce* case was not overruled by Lord Greene in *Desoutter's* case although clearly Lord Greene deprecated the tendency to give the word "investment" a limited definition and enlarged somewhat the meaning "investment" under the circumstances it was used in that case. Hence, the definition of "investment" as expounded in *Wragg's* and in *Rolls-Royce's* case remain unaffected by *Desoutter's* case. Reliance of these two cases for the purpose of interpreting the word "investment" as used in s. 2 of the Act is fully justified.

It would not be wrong for us to say that Lord Greene MR in *Desoutter's* case had driven the last nail in the coffin in respect of the meaning of the word "investment" and this is clear from

the passage at page 60 of the Report when he said:

> ... Speaking for myself, I am always disinclined to accept any general definition or test for the purpose of solving this type of question. The question whether or not a particular piece of income is income received from an investment must, in my view, be decided on the facts of the case. The facts must be ascertained, and then the question has to be answered. For the Court to find itself fettered by some apparently comprehensive attempt at a definition directed to the solution of the problem in relation to one type of property, I cannot help thinking is unfortunate. **It may well be that a definition or test, when applied to one type of property, is a useful method of approaching the particular problem in the particular case; but to take it as a guide in other cases is apt to be extremely dangerous,** and certainly, in the present case, I do not propose to do it.
> (Emphasis, added)

With respect, we agree entirely with this observation and that in the instant case we have to look at the statutory provision in which the word "investment" is used, and it is from the provision of the statute under consideration that the proper definition of the word "investment" should be determined.

Lord Tucker LJ in *IRC v. Broadway Car Co. (Wimbledon) Ltd.* [1946] 2 AER 609, in agreeing with Lord Greene MR, expressed his view on the construction of the word "investment" in the following words:

> ...For myself, I think there is very little assistance to be derived from *Comrs. of Inland Revenue v. Desoutter Bros.* which dealt with patent royalties, and was, on its facts completely different from the present one. All that was said which was relevant for present purposes was that the court deprecated analogies in these cases, and that the word 'investment' was not a term of art, but had to be interpreted according to its popular conception. Apart from that, personally I cannot find much assistance from the *Desoutter* case in arriving at a proper decision on the facts of the present case. I have, however, no reason to think that the commissioners did apply any other test than that laid down in *Desoutter*'s case, namely, that the word 'investment' must be construed in the ordinary, popular sense of the word as used by business men, and not as a term of art having a defined or technical meaning.

Applying this test to s. 2 in relation to the definition of "borrowing business" it is inevitable that "investment of the funds of the company" in the definition of "borrowing company" must be construed according to its popular sense, namely, the laying out of money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield, and consequently the provision of the guarantee does not come within the meaning of "investment".

For the purpose of determining the issues in this appeal we are mindful of Lord Hewart, CJ's dictum in *Sevenoaks Urban District Council v. Twynam* [1929] 2 KB 440 at page 443:

> ... But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted *alio intuitu* ...

In the cases discussed below the courts were dealing with the English Finance (No. 2) Act, 1939, and they approached the problem by first looking at the income or royalties, and henceforth decided whether the incomes or dividends were income and dividends from an investment. In *IRC v. Rolls Royce Ltd. (supra)* the question was whether royalties received by the respondent from the licensees in respect of the latter's patent was income received from investment for the purpose of excess profit tax. In the case of *IRC v. Desoutter Bros.* the question again was whether certain income received by the owner of a patent was a mere passive owner of the monopoly right and was the profit of investment. In *Gas Lighting Improvement Company, Limited v. Commissioners of Inland Revenue* [1923] AC 723 the question for the court was whether the shares and debentures of certain foreign companies held by the appellant were investments, within the meaning of r. 8 or Part 1 and r. 2 of Part 3 of the Fourth Schedule of the Finance (No. 2) Act 1939 so as to exclude the dividends and interests thereon from profits chargeable and the investments themselves from the capital of the trade or business. It was held that the holding of shares and debentures were investments and the dividends derived therefrom were profits from investments. So also in *IRC*

v. Broadway Car Co. (Wimbledon) Ltd. (supra). The question was whether an income derived from the sublease of land not immediately required for the business of the respondent was an income from investment. It was held that the sublease was an investment.

All these cases bring clearly into focus that in the definition of "investment" several elements are its *sine quo non*, including generally the laying out of money at risk for the purchase of property or special species of property, such as patent and income or dividend, or at least the expectation of the receipt of income from the investment. It is obvious from these cases that income features prominently and plays a decisive role on whether the money or property from which it was derived was an investment. This appeal may also be approached from this angle to decide whether in the absence of the element of income derived from a guarantee, its issuance could be classified as another extended meaning of the expression "investment".

Unlike these cases, what we have in the present case was a guarantee provided by the appellant company to the respondent in consideration of the grant of financial facilities by the respondent to Malaysia Air Charter Co. Sdn. Bhd. at the request of the appellant company. Whether the guarantee was given *gratis* or for a fee or commission was never disclosed to the Court. His Lordship ventured the proposition, no doubt he derived this finding from his own experience, both at the Bar and on the Bench, that it was not out of altruistic or charitable motives, and it would seem as if the learned Judge regarded the fee or commission or whatever, if there was any, as the income arising out of the issuance of the guarantee. If we understand the learned Judge correctly, it was explicit that he equated the fee or commission as income from the issuance of the guarantee and therefore he concluded the guarantee must be an investment. With due respect, we beg to differ. We had nothing by way of evidence to support that proposition as the circumstances under which this impugned guarantee was granted were unknown to us. Besides, a fee generally is exacted for services rendered, just as a lawyer is paid a retaining fee by a client, and could be nominal or substantial. Is the fee for preparing a guarantee or the commission to undertake the liability of a guarantor substantial enough for any financial institution to be engaged in as a lucrative venture or business? In this case we repeat we have no idea at all. There are instances where people provide guarantees free, particularly in cases of loans granted by government or semi-government bodies to students and serving officers to enable them to pursue further studies. Relatives or friends of students provide examples of guarantors who provide guarantees for free. It may well be that financial institutions are encouraged to provide guarantees because the persons whose loans are guaranteed may have business dealings with them and to grant guarantees at the times when they are most needed is to ensure that they will continue their business dealings with the financial institutions. Again, this is not unusual. Income from such guarantees could be negligible as in most cases guarantees are given as a goodwill. Thus, it could not be said with any degree of certainty that in the present case substantial commission had actually been paid to the appellant company and if it had the appellant company was strangely reticent about it. As a matter of fact the learned Counsel for the appellant company in the outline of his submission categorically stated that there was no profit actually made in this case and that there was no benefit derived by the appellant company from the issuance of the guarantee. It would not be justified for us to make a determination on an important issue such as this grounded upon mere speculation. Hence, we could not resist the conclusion that the guarantee could not be regarded as tantamount to an investment, falling within the meaning of "borrowing business" when there was no certainty that the element of income was present.

The appellant in contending that the guarantee at issue was void and unenforceable, being prohibited by law, also relied on s. 20 of the Borrowing Companies Act which provides that a licensed borrowing company shall not grant to any person an unsecured advance, loan or credit facility which in the aggregate at any one time exceeds RM5,000 and that the expression "unsecured advance, loan or credit facility", *inter alia*, means an advance, loan or credit facility secured only by a guarantee or guarantees. It was argued that the guarantee exceeding the sum of RM5,000 provided by the appellant company was tantamount to the granting of credit facility which was thus prohibited and therefore it was void and unenforceable on that ground. The appellant relied

on *R. v. Miller* [1977] 3 AER 986 and **Halsbury's Laws of England,** 4th Edn., Vol. 22, paragraphs 26 - 27 at p. 26. The relevant passage of the judgment of Roskill LJ on which the appellant apparently relied heavily as authority for its proposition appears at page 991 in the following words:

> ... The obtaining of credit, in our view, means obtaining some benefit from another, without immediately giving the consideration in return for which that benefit is confirmed ...

The definition of "credit" given in paragraph 26 of **Halsbury's Laws of England** is not of general application but is applicable only for the purpose of Consumer Credit Act, 1974. It was intended to devise a system of definitions in the Act which would constitute a coherent and novel code, which is largely independent of the statute and common law which was previously applicable to the various types of credit transactions. Paragraph 27 defines "credit" as including a cash loan and any other form of financial accommodation and may take the form of either running-account credit or fixed-gum credit. Even if we accept this definition of "credit" for the purpose of the Finance Companies Act in granting the guarantee by the appellant company there was no financial accommodation coming from the appellant company in favour of the respondent, and it would follow, therefore, that the guarantee is not the giving of credit. Similarly, the passage from *Miller's* case does not assist the appellant in construing the guarantee as granting a credit. It is trite law that in construing the words in an Act of Parliament we must ascertain their meaning, bearing in mind that it is undesirable to take words in the Act as being used out of their ordinary sense. It was pointed out in the case of *The Queen v. Peters* [1885-86] 16 QBD 636 at page 641 that the giving of credit involves, in one way or another, an agreement to postpone payment of what in the absence of such agreement, would be immediately due. In the words of Lord Coleridge CJ a person obtains credit in such a situation as this:

> ... where a man obtains goods and does not pay for them for a substantial period of time, I am not prepared to say that we ought to limit the plain meaning of the words in the Act of Parliament. The prisoner has obtained credit and has had it, whether or not he stipulated for it at the time of the purchase ...

Stark J. in *Herbert v. The King* [1941] CLR, Vol. 64, 461 at page 465, in speaking of credit, said:

> A sale of goods or other things upon the promise of deferred or future payment is a sale upon credit. The purchaser is trusted with the goods or things without present payment and obtains or is given credit for the debt or liability which he incurs in the acquisition of those goods or things ...

The issuance of a guarantee does not come anywhere near the definition of credit as expounded in all the cases cited above.

The appellant's contention on this issue is nothing more than a futile attempt to alter the position of the guarantor to that of a creditor when the guarantor's undertaking under a contract of guarantee is a collateral undertaking to answer for the debt or to fulfil the obligations of another on his default, a case of the absurdity of reconciling the irreconcilables.

In the instant case, Malaysia Air Charter Sdn. Bhd. was the principal debtor on whom lies the primary liability while the appellant company assumes the collateral liability which would only arise on the default of the principal debtor and the respondent is the acknowledged creditor. This is the uncontroverted position, both in fact and in law and, in our view, s. 20 does not in any way, or intended by Parliament to, alter that position to render the appellant company as the creditor, and thereby, creating two creditors in respect of the same amount of money advanced to the same principal debtor. The provision of the guarantee viewed in the light of this preposterous proposition is the antithesis of giving credit, untenable and a blatant fallacy, resulting in an argument *reductio ad absurdum*. On these two grounds the arguments advanced by the appellant should fail.

The last contention of the appellant on the invalidity and unenforceability of the guarantee is based on the view that the issuance of the guarantee amounted to dealing by the appellant in foreign exchange currency which is prohibited by s. 6 of the Act, but this issue was not really seriously pursued for obvious reasons. We were urged to give a liberal definition of the word "dealing" in s. 6 of the Act by reference to s. 4(1) of the Exchange Control Act 1953 where it is provided that:

> Except with the permission of the Controller, no person, other than an authorised

> dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.

However, the appellant did not cite any authority for his proposition that that provision of a guarantee was dealing in foreign currency within the meaning of s. 4 of the Exchange Control Act. In our view, the word "dealing" in s. 4 of this Act cannot by any reasonable process of interpretation be held to include the issuance of a guarantee in the sense that it is tantamount to either buying, borrowing, selling or lending of foreign currency. It could be argued that the word "dealing" with reference to s. 4 could possibly be interpreted to include lending or borrowing but then this argument is elided by the Counsel for the appellant company's own submission that a guarantee was neither lending nor borrowing, citing the case of *Malaysia Shipyard and Engineering Sdn. Bhd.v. Bank Kerjasama Rakyat Malaysia Bhd.* [1985] 2 MLJ 359 per Salleh Abas LP at page 360. If giving a guarantee is neither lending nor borrowing it cannot perforce be dealing with reference to s. 4 of that Act. A guarantee is a contingent liability and the obligation to pay only arises in the event of default by the debtor. Under the terms of the guarantee the equivalent of RM2,340,000 is the amount due from the guarantor in the event of default, and if the respondent obtains judgment in respect of this sum of money in the High Court it would certainly be paid in Malaysian currency. If the respondent wishes to remit that sum of money to England in English currency then it has to deal with the appropriate authority under the Act for permission to do so and until that event happens it is premature to speculate whether the respondent will or will not apply for the permission of the Controller of Exchange or that if application is made it would not be approved. Certainly, none of the elements of dealing as understood in its application to and stipulated in s. 4 of the Exchange Control Act are present in the case of the issuance of a guarantee. We are satisfied there is no merit on this ground and it should also fail.

Before we conclude, we would wish to address our minds briefly to the contention of the appellant that the issuance of the guarantee was *ultra vires*, but as we indicated in the course of argument that the question of *ultra vires* only arose if the provision of guarantee by the appellant company was not authorized by its Memorandum of Association since it was incorporated under the Companies Act. It could not be *ultra vires* the Finance Companies Act which only regulates its borrowing business. We recall that the Counsel for the appellant conceded this point in view of the remark from the Bench. That is all we have to say on this point.

For the various reasons given above, we would dismiss this appeal with costs. The deposit to the respondent on account of taxed costs.